Mohd Haris bin Mohd Shah v Public Prosecutor and another appeal

HIGH COURT (MUAR) — CRIMINAL APPEAL NOS 42–12 OF 2002 AND 42–12 OF 2003
JEFFREY TAN J
26 JUNE 2003

Criminal Procedure *— Sentence — Assessment of sentence — Whether trial court had correctly applied sentencing principles*

The appellants pleaded guilty to an offence under ss 392 and 397 read with s 34 of the Penal Code. They were both first offenders. However the trial court was of the view that the offence was a serious offence and that the public had to be protected from an offence of such a nature. They were each sentenced to seven years' imprisonment and two strokes of the rotan. They appealed against the sentence to the High Court.

Held, dismissing both appeals:

The admitted facts revealed a brazen crime. The trial court was right to say that civilized society must be protected from an offence of such a reprehensible character. The trial court had applied the correct principle in the assessment of the sentence. Public interest demanded a deterrent sentence. It could not be said that the instant sentence was manifestly excessive to warrant interference. The appeals ought therefore to be dismissed (see p 627G-I).

[Bahasa Malaysia summary

Perayu-perayu telah mengaku bersalah terhadap satu kesalahan di bawah ss 392 dan 397 dibaca bersama s 34 Kanun Keseksaan. Kedua-dua tertuduh merupakan pesalah kali pertama. Bagaimanapun mahkamah perbicaraan berpendapat bahawa kesalahan tersebut merupakan satu kesalahan serius dan bahawa masyarakat awam harus dilindungi daripada kesalahan bersifat sedemikian. Kedua-dua tertuduh masing-masingnya telah dijatuhkan hukuman penjara tujuh tahun dan dua kali sebatan rotan. Mereka telah merayu terhadap hukuman Mahkamah Tinggi.

Diputuskan, menolak kedua-dua rayuan tersebut:

Fakta-fakta yang diakui mendedahkan satu jenayah yang kejam. Hakim perbicaraan adalah betul untuk mengatakan bahawa masyarakat bertamadun perlu dilindungi daripada kesalahan bersifat keji. Mahkamah perbicaraan telah menggunakan prinsip yang betul dalam menilai hukuman. Kepentingan awam menuntut satu hukuman pencegahan. Ia tidak boleh dikatakan bahawa hukuman semasa adalah keterlaluan untuk mewarankan campur tangan. Rayuan-rayuan tersebut oleh itu patut ditolak (lihat ms 627G-I).

A **Notes**

For cases on assessment of sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2931–2936.

B **Cases referred to**

Ang Chai Seng v Public Prosecutor [2000] 2 MLJ 35 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Dato' Seri Anwar bin Ibrahim [2002] 3 MLJ 193 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
R v Kenneth John Ball 35 Cr App R 164 (refd)

C **Legislation referred to**

Penal Code ss 34, 392, 397

D **Appeal from**: Criminal Trial No 62–51 of 2001 (Sessions Court, Batu Pahat)

Abraham Matthew (*Ramesh Vasan* with him) (*Ramesh Vasan & Co*) for the appellant.

E *Haslinda bte Abu Bakar* (Attorney General Chambers) for the respondent.

Jeffrey Tan J: All three appellants pleaded guilty in the trial court to the following offence:

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> Bahawa kamu bersama-sama pada 20 Jun 2001, jam lebih kurang tiga pagi, bertempat di sebuah rumah tidak bernombor, Ladang Yong Peng, Bahagian A, Yong Peng, di dalam Daerah Batu Pahat, dalam Negeri Johor, telah melakukan samun bersenjatakan sebatang besi, sebilah pisau dan sebatang pemutar skru ke atas penama-penama SITI MUAWANAH BTE NORIADI, KPT: 600503-71-5055, SITI AISAH BINTI MISBAH, KPT: 840821-01-5448, SITI ROHANI BINTI MISBAH, KPT: 860203-01-6954, iaitu dengan mengambil wang tunai sebanyak RM570, sebuah motosikal jenis YAMAHA Y110SS2, nombor pendaftaran BFV 4345, Enjin No 3YR2298337N, Casis No HHS-298337, tiga utas rantai leher emas, tiga bentuk loket emas, dan sepasang anting-anting emas, yang mana jumlah kesemuanya RM5,560. Oleh yang demikian, kamu telah melakukan satu kesalahan dan boleh dihukum di bawah ss 392/397 Kanun Keseksaan dan dibaca bersama di bawah s34 Kanun yang sama.

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This is their appeal in respect of the sentence only. The punishment for armed robbery committed between sunset and sunrise is imprisonment for

I a term which may extend to 14 years, and the offender shall also be liable to be whipped. The punishment imposed on the appellants, was seven years imprisonment and two strokes of the rotan. Hence, the instant sentence was

well within the permitted range. But an appellate court may interfere with the sentence, even if the sentence is within the permitted range.

In *Civil and Criminal Appeals in Malaysia* by Tan Kee Heng at pp 191–192:

> ... the appellate court is ready to interfere with the sentence imposed by the trial court upon proof of one or more of the following circumstances: (a) The sentence imposed by the trial court was manifestly excessive or inadequate; (b) There is a manifest error either in law or in considering the facts and circumstances of the case; (c) The sentence passed by the trial court is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances; (d) The trial court has given undue weight to some of the evidence; (e) The trial court, in fixing the sentence, had failed to adequately consider all the relevant factors either for or against the offender; (f) the sentence was wrong in law;. (g) the unsatisfactory features of the proceedings in the lower court; (h) the charge has been hanging over the accused's head for a considerable period; (i) justice does not appear to be done.

Still it is 'a firmly established principle that an appellate court would be slow to disturb the sentence imposed by the lower courts unless the sentence is excessive to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles then this court will intervene' (see *R v Kenneth John Ball* 35 Cr App R 164). According to Hashim Yeop Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257, 'It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence'; (see *Ang Chai Seng v Public Prosecutor* [2000] 2 MLJ 35 per Haidar JCA, as he then was). And the Court of Appeal in *Ang Chai Seng* reiterated what was said by Federal Court in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, at p 84:

> ... this court has said it again and again that it will not normally interfere with sentences, and the probability or even the possibility, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference. For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorized or extraneous or irrelevant exercise of discretion.

In *Bhandulananda Jayatilake*, the Federal Court per Raja Azlan Shah Ag LP (as he then was) imparted the following guide:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that itsimposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to

A similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [[1952] AC 525]). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for
B that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient per se to warrant this court's interference.

The latter is still the guide to follow (see *Dato' Seri Anwar bin Ibrahim* [2002]
C 3 MLJ 193, where the Federal Court expressed its full agreement with *Bhandulananda Jayatilake*).

But nothing was said by any of the appellants who argued their own appeals to warrant any interference with the sentence of the trial court. Mohd Haris merely asked for 'jasa baik' and said he was a first offender.
D John asked for a lighter sentence and a second chance, and said he was a first offender and that he would not repeat the offence. Mustapha merely asked for the two strokes of the rotan imposed to be reduced. At first blush, a seven year imprisonment term would appear not to be not harsh. Mohd Haris and John were after all first offenders who pleaded guilty and saved
E much judicial time (Mustapha committed his last offence in 1983). But the trial court was of the view that the offence was a serious offence and that the public must be protected from an offence of such a nature.

The admitted facts were that at 3am on the morning in question, the appellants first broke into the house of their victim and then forced their way into the bedroom where their victim was asleep. John and Mustapha kicked
F open the bedroom door. John and Mustapha who were armed with a screwdriver and a knife then entered the bedroom and caught hold of their victim. John and Mustapha ordered their victim, a woman, to remain quiet. But their victim shouted and then received a punch from John. Their victim was then compelled by threats of physical violence to hand over her
G jewellery and a sum of RM570. Meanwhile at the guest hall, Mohd Haris guarded the children of their victim. Then when departing from the scene, John took the motorcycle of the husband of their victim and parked outside the house. The admitted facts revealed a brazen crime. It would seem that nothing could deter the appellants from their foul objective. The appellants
H kicked down the bedroom door to get to their victim. The appellants were no different from a band of lawless brigands. The appellants had no respect for law and order. Need it be said that their victim and her children would have had a most frightening experience. The trial court was right to say that civilized society must be protected from an offence of such a reprehensible character. The trial court had applied the correct principle in the assessment
I of the sentence. Public interest demanded a deterrent sentence. It could not be said that the instant sentence was manifestly excessive to warrant interference. This appeal is therefore dismissed.

Both appeals dismissed.

Reported by Andrew Christopher Simon